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Twenty-eighth session

SUMMARY RECORD OF THE 570th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 17 May 1995, at 2 p.m.

Chairman: Mr. GOH (Singapore)

CONTENTS

Electronic data interchange: draft Model Law (*continued*)

Article 10 (*continued*)
Article 11

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The meeting was called to order at 2.10 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW *(continued)* (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4; A/CN.9/XXVIII/CRP.6, A/CN.9/XXVIII/CRP.7)

Article 10 (*continued*)

1. **The CHAIRMAN** reminded the Commission of the Italian proposal made at the previous meeting to delete article 10, which would require consequential changes in other articles in chapter III, and the proposal by Denmark to insert a provision in the Guide to the effect that the members of the Commission agreed that article 10 did not require States whose domestic legislation allowed parties to exclude the operation of any of the rules in chapter II to change their existing practice. There was also a proposal from Mexico, which he asked the representative of that country to clarify further.

2. **Mr. ABASCAL ZAMORA** (Mexico) said that there seemed to be general agreement that party autonomy should be permitted but that the right of parties to vary provisions by agreement could not extend to mandatory provisions of domestic law. Rather than the existing drafting group, perhaps a small ad hoc drafting group could be set up and asked to seek a form of words making it possible to implement that agreement.

3. **Mr. BONELL** (Italy) said he did not believe that deletion of article 10 would require any consequential changes.

4. Regarding the Danish proposal, what was being adopted was a Model Law and he saw little sense in stating in a separate document that States were free to adopt arrangements different from the provisions of article 10.

5. **Mr. SORIEUL** (Secretariat) said that, without wishing to prejudge any decision of an ad hoc drafting group, he would like to suggest that a second paragraph might be added to article 10 on the following lines: "Paragraph (1) of this article is not intended to deal with any rights of the parties to vary any rule outside the provisions of this chapter".

6. **Mr. BURMAN** (United States of America) and **Mr. ANDERSEN** (Observer for Denmark) welcomed that suggestion.

7. **The CHAIRMAN** suggested that the matter be referred to a small ad hoc group led by the United States delegation, to work out a new text along the lines just proposed.

8. *It was so agreed.*

Article 11

9. **Mr. SORIEUL** (Secretariat) said that the text of article 11 in the annex to document A/CN.9/406 had raised problems. The delegations of Australia, the United Kingdom and the United States had prepared a new draft of the article, appearing in document A/CN.9/XXVIII/CRP.7, which was now before the Commission. He wished only to mention in that regard that the term "reasonable notice" in the original English version of paragraph (4) of the proposal posed translation difficulties.

10. **Mr. GRIFFITH** (Australia) said that it might be slightly overstating the case to say that his delegation was one of the authors of the proposal, but he supported the text, which stated more positively and openly what had been the intention of the Working Group's text. However, paragraph (3) (a) (ii) of the new draft, which enabled the addressee absolutely to regard a message as that of the originator if that were reasonable in the circumstances, did raise the policy question whether it was appropriate to enable an addressee to regard a data message as being that of the originator as against an originator who might in fact have absolutely no connection with the message. It was true that paragraph (3) (b) provided for the liability of an originator in enabling a person to gain access to a method used to identify the message, which seemed to be a perfectly appropriate basis for the assignment of responsibility. But he would be interested to hear the views of other delegations on whether it was appropriate that a person be regarded as originator merely because the addressee could in the circumstances say that it was reasonable for him to apply a particular procedure.

11. **Ms. BOSS** (United States of America) agreed that that was an important policy issue. However, paragraph (3) (a) (ii) of the new draft had been included because there was a similar provision in the draft approved by the Working Group.

12. The purpose of the draft presented in document A/CN.9/XXVIII/CRP.7 was mainly to reorganize the substance of the former article 11. Paragraphs (1) and (2) were taken from the former paragraph (1) and merely restated what would be the outcome in nearly all jurisdictions — namely, that an originator was bound by the messages that he sent, and by the actions of his agents. Paragraph (3) consolidated what was said in two paragraphs of the Working Group's text. It dealt with three situations; the first was that in which an agreed security procedure was followed, and in that circumstance the addressee could regard the data message as being that of the originator. The phrase "an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption" attempted to clarify the intention of the phrase in paragraph (3) of the Working Group's text containing the alternative "[deemed] [presumed]". The second situation was that where a message came from a person who had gained access to the system by reason of a relationship with the originator. The basic principle was that the sender of a message was responsible for adequate security regarding its system, so that the addressee of any message generated by such other person would be entitled to regard that message as being that of the originator. The third situation, which involved the point raised by the Australian delegation, was that in which the addressee used security procedures that were reasonable under the circumstances.

13. Paragraph (4) and its two subparagraphs stated that the addressee must not regard a message as coming from the originator if he knew or should have known that it came from elsewhere or had received reasonable notice to that effect. "Reasonable notice" meant that the addressee must have sufficient time to respond to such notification.

14. Paragraphs (5), (6) and (7) dealt with two situations, one in which there was an error in the message and one in which there was an erroneous duplicate message. Those paragraphs merely restated what had already been decided by the Working Group.

15. **Mr. ABASCAL ZAMORA** (Mexico) welcomed the proposed amendment submitted by the delegations of Australia, the United States and the United Kingdom and thanked the representative of the United States for her explanation.

(*Mr. Abascal Zamora, Mexico*)

16. He noted that it was customary procedure, especially in EDI, for there to be a prior agreement between the parties about the manner in which the authenticity of a message could be verified, which was covered by paragraph (3) (a) (i). However, it had been noted in the Working Group that there were open EDI systems and it was increasingly common that messages could be received from persons with whom there had been no previous agreement on identification procedures. It was therefore necessary to find a solution to that problem. The procedure followed in his country was to take as a basis the Model Law on International Credit Transfers, in which the assumption was accepted that messages could well come from persons with whom no communication protocol had been previously agreed. He therefore favoured the retention of paragraph (3) (a) (ii).

17. **Mr. CHOUKRI SBAI** (Observer for Morocco) welcomed the proposed amendment of article 11 as being clearer than the original text. He agreed with the remark of the Secretariat regarding the term "reasonable notice". Perhaps the wording "received notice within a reasonable time period" or "... reasonably timely notice" could be used.

18. **Mr. SCHNEIDER** (Germany) welcomed the proposed amendment to article 11 but thought that the policy behind paragraph (3) (a) (ii) was not at all convincing. To take an example, if a person's name was used as that of the originator, it would be very difficult to prove the facts if an addressee received a falsified data message. He opposed acceptance of paragraph (3) (a) (ii).

19. **Mr. BONELL** (Italy) said he took it, on the basis of the definition in article 2 (a) of the Working Group's draft, that data messages also included telegrams and telexes. If that was the case, what were the implications of paragraph (3) of the proposed new text for article 11 in respect of telegrams? Was the receiver of a telegram entitled to consider it as emanating from the apparent sender only if he had applied a procedure previously agreed between him and that sender?

20. With respect to EDI, he found it difficult to understand paragraphs (4) to (7) of the proposed new text. They dealt basically with errors in transmission of messages, and that involved contract law. In the new text, there were really three similar situations that were dealt with differently: the case in which there was some question as to whether the message was to be regarded as from the originator; the case of an error in the content of the message; and the case of duplication. In the first of those cases, the proposal would entitle an originator at any time to give notice in order to disown and nullify a message. That was a new concept that caused him concern. He would welcome clarification.

21. **Mr. ANDERSEN** (Observer for Denmark) said that one of the reasons why a new law was needed was that electronic communications, unlike telegrams which were delivered by a single postal service, had no fixed framework: they could be transmitted between two individuals with computers. There was thus need to rewrite many of the assumptions underlying the law governing traditional communications, and that was not an easy process. He found the proposed new text of article 11 well drafted, but was concerned that the revised paragraph (6) seemed to have moved away from the original provision that the recipient would be entitled to act on an erroneous message only if he had no reasonable knowledge of the error.

22. **Mr. MADRID** (Spain) shared the view of the Mexican representative that the concept of using a reasonable procedure to determine whether a message originated from a given person should be retained, since it reflected existing practice. Paragraph (3) (a) (ii) should be considered in conjunction with paragraph (4) (b), which provided that if the addressee knew, or should have known, that the message was not that of the originator, paragraph (3) (a) (ii) did not apply.

23. He suggested that a further limitation should be introduced in paragraph (4) (a) by an addition along the following lines: "unless the addressee proves the contrary". The issue should be seen as linked to article 12 concerning acknowledgement of receipt.

24. **Mr. BURMAN** (United States of America) said the issue now under consideration had been discussed at great length in the Working Group, and the Group's conclusions had been made known to successive plenary sessions of the Commission. In his view, it was inappropriate at the present stage to try to return to basic issues, such as why the Model Law should be covering areas that might be considered as coming within the field of contract law. The Commission should limit itself essentially to making drafting improvements.

25. **Ms. BOSS** (United States of America), on the question of the relationship between article 11 and contract law in general, pointed out that not all data messages led to the creation of contracts. Article 11 was applicable far beyond the bounds of contract law. However, every effort had been made to avoid conflict between the Model Law and contract law.

26. A question had been raised regarding the possibility for a purported originator to deny a message under paragraph (4) (a). She wished to point out that article 11 (1) made it clear that a data message was that of the originator if it was sent by the originator, implying that, once sent, the originator could not disown it. Paragraph (4) did not affect paragraph (1) or paragraph (2). Thus, if an originator, or his agent, sent a message, no disavowal was possible under article 11. Disavowal was limited to the situation provided for under paragraph (3), which in that regard was unique.

27. A further question had been whether the three types of error listed, relating respectively to the originator, to content, and to transmission, were in fact parallel. Where distinctions were made, it was for a good reason; thus, should it occur that one firm notified another that there had been a breach of security, and that in fact it was no longer the originator of data messages purporting to come from it, paragraph (4) (a) was crucial, since it provided that, once notification had been received, the addressee must disregard future data messages. The reason notification had been treated separately was that it related primarily to agreed security procedures, which were part of common practice in electronic commerce.

28. **Mr. UCHIDA** (Japan) said he considered paragraph (1) unnecessary, since it was already covered by the definition of "originator" in article 2. Since the text would have to be translated into Japanese, he would appreciate an explanation of the difference between "deemed" and "is entitled to regard".

29. The original text of article 11 and the new draft text presented the same difficulty, in that an addressee who had applied an agreed identification procedure could be protected even when he knew, or should have known, that the message was not from the originator. He therefore suggested that the case provided for under paragraph (3) (a) (i) of the new proposal should also be covered by paragraph (4) (b).

30. **Mr. GRANDINO RODAS** (Brazil) supported the proposed text.

31. **Ms. REMSU** (Observer for Canada) said she was concerned as to the possible impact of article 11 on third parties, who might be held liable even if they had no connection with the addressee or the originator. She suggested that in paragraph (3) (a) (i) the phrase "bearing in mind the relationship between the addressee and the originator" might be added.

32. **Mr. BONELL** (Italy) said it had not been his intention to reopen the debate on basic issues: he had simply been concerned to ensure that the Commission was clear as to the meaning of provisions before adopting them. As he saw it, the proposed new text was fundamentally different from the original article 11, which had come within the framework of contract law in that an addressee could challenge the authenticity of a message only if he was in a position to discover the error. The original text of article 11 made no provision for the originator to notify an error, and thereby nullify his original message. In addition, the proposed paragraph (6) provided that paragraph (5) should not apply "at any time" in the circumstances set out. He wondered why that was proposed, and whether the Commission was aware of the implications of the new provision for telegrams, telexes and faxes.

33. **The CHAIRMAN** said the Italian representative's concern might perhaps be met if, when the Commission came to consider the definition of a data message, it excluded telexes or telegrams transmitted via the postal services.

34. **Mr. ABASCAL ZAMORA** (Mexico) supported the Japanese proposal that paragraph (4) (b) should be extended to cover paragraph (3) (a) (i).

35. **Mr. ALLEN** (United Kingdom), referring to the representative of Italy's argument that the notice mentioned under paragraph (4) could nullify the right of the addressee to rely retrospectively on a data message, said that that was not the authors' intention, nor was it, he thought, the effect of the language. The words "at any time when" had been deliberately chosen rather than words such as "in a case where". The intended purport was that the addressee's entitlement to rely on the data message as being that of the originator would cease on receipt of the notice but that his entitlement to rely on it up to that point would be unaffected. Paragraphs (4) and (6) referred back to previous paragraphs entitling the addressee to rely on the message up to the point in question.

36. In response to the suggestion by the representatives of Japan and Mexico that paragraph (4) (b) should apply to the circumstances referred to in paragraph (3) (a) (i), he said that such a provision seemed unnecessary inasmuch as paragraph (4) (b) would not be applicable if the addressee had properly applied an agreed procedure, thus exercising reasonable care.

37. As to why paragraph (1) had been separated from paragraph (2) and the word "deemed" changed to "is", it was felt that "deemed" did not make sense in the case of a data message actually communicated by the originator. Paragraph (1) could perhaps be deleted but it seemed to have some value as a definition of what was meant by a data message being that of the originator.

38. He felt that the suggestion of the representative of Spain to insert the words "unless the addressee proves the contrary" in paragraph (4) (a) was unnecessary because, if the addressee could prove independently that the data message was that of the originator, the case would fall under paragraph (1).

(*Mr. Allen, United Kingdom*)

39. Paragraph (3) (a) (ii) had been included in deference to what appeared to be the desire of the Working Group. He felt that the flexibility embodied in the words "reasonable in the circumstances" might well be sufficient to justify the retention of the subparagraph. However, an alternative would be to have a new paragraph dealing with the case in question and perhaps enact a presumption to apply as between the originator and the addressee in those circumstances.

40. The difference between saying that a data message was "deemed to be that of the originator" and saying that an addressee was "entitled to regard it as that of the originator and to act on that assumption" related essentially to the time problem. In the former case, it might mean that the message was deemed for all time to be that of the originator; in the latter case, the addressee's actions were protected until such time as he received notice or should have known that the message was not that of the originator.

41. **Ms. BOSS** (United States of America) said that two crucial policy issues had been raised. The first related to the proposal by the representatives of Japan and Mexico to make paragraph (4) (b) applicable to instances in which an agreed security procedure was followed. That would amount to a policy change with respect to article 11 as approved by the Working Group and one which she viewed as quite inappropriate. Paragraph (4) (b) dealt in part with situations where an addressee should have known that a message was not that of the originator if it had applied an agreed security procedure, and paragraph (3) (a) (i) came into play only where the agreed security procedure had been used. On the other hand, the imposition of an additional standard ("knew or should have known had it exercised reasonable care") would render the security procedures negotiated by the parties meaningless.

42. The second policy issue concerned paragraph (3) (a) (ii), which provided for the application by the addressee of a security procedure that was "reasonable in the circumstances". That was a problematic provision, because if there was no agreed security procedure a "hacker", for example, might send a message purporting to come from someone else. In her view, the alternatives were either to delete paragraph (3) (a) (ii) or to deal with the situation in a separate paragraph setting out the circumstances in which an originator could overturn reliance on a data message by an addressee. The latter option would certainly require a lengthy discussion of the wording of the paragraph. She would therefore favour deleting paragraph (3) (a) (ii).

43. **Mr. UCHIDA** (Japan) said that he still felt it was reasonable to apply paragraph (4) (b) to paragraph (3) (a) (i) because, if the addressee knew that a data message was not that of the originator, it would be unfair to insist that the originator should be bound by the message. Such a consequence would be unavoidable if the text were left as it stood.

44. **Mr. AL-ZEID** (Observer for Kuwait) asked why the heading "Attribution of data messages" had been omitted from the proposed new version of article 11.

45. He suggested that the words "to act on that assumption" in paragraph (3) should be amended to read "to act accordingly".

46. The wording of paragraph (6) (b) was unclear, at least in the Arabic version, and should be revised in the interest of clarity.

47. **The CHAIRMAN** said that, if he heard no objection, he would take it that delegations wished to base the discussion on the version of article 11 contained in paper A/CN.9/XXVIII/CRP.7. The discussion would proceed on a paragraph-by-paragraph basis.

The meeting was suspended at 3.50 p.m. and resumed at 4.15 p.m.

48. **Mr. GRIFFITH** (Australia) proposed that the heading "Attribution of data messages" used in the Working Group's version of article 11 should be retained.

49. *It was so agreed.*

50. *Paragraphs (1) and (2) were adopted.*

51. **The CHAIRMAN** drew attention to paragraph (3) and asked whether delegations wished to delete paragraph (3) (a) (ii).

52. **Mr. BONELL** (Italy) said that his decision would depend on whether the scope of article 2 (a) of the draft Model Law remained unchanged. If it still covered such means of communication as telegrams and telexes, paragraph (3) (a) (ii) of article 11 would have to be retained, as there was no previously agreed procedure for dealing with those two means.

53. **The CHAIRMAN** said that for the time being the assumption was that article 2 (a) remained unchanged. An amendment thereto could subsequently be proposed.

54. **Mr. ABASCAL ZAMORA** (Mexico) observed that the content of paragraph (3) (a) (ii) had been approved by the Working Group.

55. **The CHAIRMAN**, after inviting delegations to indicate their attitude, noted that there was insufficient support for the deletion of paragraph (3) (a) (ii).

56. *Paragraph (3) was adopted.*

57. **The CHAIRMAN** invited comments on paragraph (4).

58. **Mr. ANDERSEN** (Observer for Denmark) asked for clarification of the words "reasonable notice" in paragraph (4) (a). Could such notice be given at any time? If that were the case, the subparagraph implied the existence of a *negotium claudicans*, an agreement that was binding on one party but not on the other.

59. **Mr. MADRID** (Spain) said that, in the light of the explanation given by the representative of the United Kingdom, he was withdrawing his proposal to add the words "unless the addressee proves the contrary" to paragraph (4) (a). However, he felt that some clarification of what was a very complex provision should be included in the Guide. The United Kingdom representative had also explained that the addressee would be entitled to act on the assumption that a data message was that of the originator until such time as the originator had given notice to the contrary. That clarification might also be included in the Guide.

60. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that, at least in the Arabic version, it was important that the notion of time should be incorporated in the expression "reasonable notice".

61. **Ms. BOSS** (United States of America) said there were two aspects to the notion of reasonable time embodied in paragraph (4) (a). First, as the United Kingdom representative had pointed out, notice had to reach the addressee before the latter relied on the message, otherwise it would be ineffective. Secondly, in many cases where EDI was used, computers were programmed to respond to a data message immediately it was received. Where a message had been transmitted in breach of the originator's security system, a telephone call made by the originator to the addressee to warn the latter of the fact might not — assuming the addressee to be a large company whose switchboard had to pass the call on to a member of its staff — reach the appropriate person in time for the addressee's system to be shut down or reprogrammed. For that reason, trading partner agreements involving the use of EDI invariably provided that the originator should give the addressee notice of a spurious message in sufficient time for the latter to alter its programmes. That situation might be catered for in the text of paragraph (4) (a) by the use of the expression "timely notice", "sufficient notice" or "sufficient and timely notice" and it should be dealt with in the Guide as well.

62. **Mr. ANDERSEN** (Observer for Denmark) said that, for him, "reasonable notice" meant "fair notice". He would prefer the text to speak of "immediate notice" or "prompt notice", so as to emphasize the temporal aspect of the situation rather than fairness.

63. **Mr. BONELL** (Italy) agreed with the United States representative that the matter should be explained in the Guide.

64. **Mr. GRIFFITH** (Australia) endorsed the comment made by the Danish representative. He suggested that the expression "reasonable notice" should be replaced by "reasonable and prompt notice".

65. **Mr. ALLEN** (United Kingdom) opposed the suggestion to use a word such as "prompt" or "timely", because the originator might be unaware that a message purporting to be its own had been sent to the addressee. The relevant time was that which elapsed after receipt of notice by the addressee.

66. **Mr. SCHNEIDER** (Germany) said that the originator could not be expected to give the addressee notice of a spurious message unless and until it knew that such a message had been sent. His delegation favoured the use of the words "prompt notice".

67. **Mr. CHOUKRI SBAI** (Observer for Morocco) proposed the deletion of the word "reasonable".

68. **Ms. BOSS** (United States of America) said that her delegation believed that by and large the Commission understood "reasonable notice" to mean notice given in time sufficient to allow the addressee to act. She therefore proposed the deletion of the word "reasonable" and the insertion, at the end of paragraph (4) (a), of the words ", in time sufficient to allow the addressee to act" after the words "of the originator".

69. **Mr. BONELL** (Italy) said that he found the language of the suggested insertion unsuitable for a statutory text. The matter should be dealt with in the Guide.

70. **Mr. ABASCAL ZAMORA** (Mexico) welcomed the United States proposal. It had the advantage of being couched in language which occurred in the Model Law on International Credit Transfers in regard to notice of revocation of a payment order.

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71. **The CHAIRMAN** said that, if he heard no further objection, he would take it that the Commission approved paragraph (4) (a) of the three-nation proposal (A/CN.9/XXVIII/CRP.7) as amended by the United States.

72. *It was so agreed.*

73. **The CHAIRMAN** invited comments on paragraph (4) (b).

74. **Mr. MADRID** (Spain) recommended a careful scrutiny of the text from the drafting aspect.

75. **The CHAIRMAN** drew the Commission's attention to the proposal made by Japan, that the scope of paragraph (4) (b) should be extended to cover paragraph (3) (a) (i). After inviting delegations to indicate their attitude, he noted that there was no broad support for that proposal and therefore took it that the Commission approved paragraph (4) (b) as it appeared in document A/CN.9/XXVIII/CRP.7.

76. *It was so agreed.*

77. *Paragraph (4) as a whole was approved.*

78. **The CHAIRMAN** said that paragraph (5) seemed to be acceptable. He invited comments on paragraph (6).

79. **Mr. BONELL** (Italy) said that, bearing in mind the qualification relating to time for notice which the Commission had included in paragraph (4) (a), it would be logical to insert a similar qualification in paragraph (6). However, his delegation would prefer instead to delete the words "at any time" from the introductory wording, as well as the words "has been notified by the originator or" in subparagraph (a); and then to combine the two subparagraphs to read: "knew or should have known that there were any errors in the process of transmission, had it exercised reasonable care or used any agreed procedure to ascertain the presence of any errors in transmission".

80. **Mr. ANDERSEN** (Observer for Denmark) said that the text should make clear the need for prompt notice. He therefore suggested either that the words "immediately after receipt of the data message" should be inserted in paragraph (6) (a) after the word "transmission", or that the paragraph should be modified along the lines of the wording approved for paragraph (4) (a).

81. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that the words "at any time" did not appear in the French version of the three-nation proposal and perhaps had no substantive import.

82. **Ms. BOSS** (United States of America) said that she could not speak for the other sponsors of the three-nation proposal, but that her delegation would not object to the changes suggested by the representative of Italy. The question of notice was less important in relation to paragraph (6) than it had been in paragraph (4), and in any case the idea of notice was subsumed in the words "knew or should have known that there were any errors"; moreover, the text proposed by Italy would be consistent with paragraph (7). If the Italian proposal was adopted, the words "at any time" should be removed from paragraph (4) (b) as well.

83. **Mr. ALLEN** (United Kingdom) said that the words "at any time" had been included in paragraph (6) because it was important to make clear that paragraph (5) would cease to apply only from the time when the addressee was notified of the error or knew or should have known of it. An alternative way of dealing with the point would be for the text to say "after the addressee has been notified or it has or should have come to his knowledge that there were any errors".

The meeting rose at 5.05 p.m.